

Response to Complaints of Harassment, Violence and Discrimination

To limit potential liability, employers should immediately respond to complaints of harassment, violence or threats of violence, and discrimination. Further, such complaints usually should be handled through a formalized process. Line supervisors generally should not attempt to resolve such issues alone but rather should notify top management and human resource personnel for an organizational response. Additionally, the employer's response to a complaint should be carefully documented.

I. The Complaint

An employer typically learns of inappropriate workplace behavior through an employee complaint. The first step an employer must take is to ascertain as much information about the allegations as possible. The person receiving or handling the complaint should ask the complaining employee:

- What happened?
- When did it happen?
- Has it ever happened before?
- Has it happened to anyone else?
- Who was present when it happened?
- Have you talked with anyone about the incident(s)?
- To what extent was the behavior welcome or unwelcome?
- Was it conveyed to the alleged harasser that the behavior was unwelcome?
- Is there any other information you may have that would substantiate the allegation(s)?

Additionally, the complaining employee should be encouraged to detail the allegations in writing. However, an employer cannot ignore its responsibility to investigate a complaint simply because an employee refuses to put anything in writing. Likewise, an employer cannot ignore anonymous complaints of inappropriate workplace behavior.

The general tone of the initial contact with the complainant should reassure the employee that the agency will take the complaint seriously and that the employee is to be commended for coming forward.

When first meeting with the complaining employee the procedures for conducting a workplace investigation should be discussed. The employer's policy of prohibiting retaliation and how to report it should be discussed with the employee. The employee should also be instructed not to discuss the investigation with other employees until the investigation is complete.

Although an employer can reassure an employee that they will generally try to proceed in as confidential a manner as possible, an employer should not in any way promise or guarantee confidentiality.

Lastly, the complaining employee should be asked for input as to what should be done to remedy the problem. However the employee should be told that, although his or her suggestions will be considered the employer has an obligation to decide independently what corrective action should be taken.

II. Evaluating the Complaint

After obtaining an allegation, the employer must evaluate the information it has received to determine whether to proceed with a formal workplace investigation.

Many identified problems can be quickly remedied without the need for a formal investigation. However simply telling an alleged harasser to "steer clear" of the complainant and other responses that do not determine whether the alleged conduct occurred are not sufficient.

As a general rule, where the allegations are serious in nature, identify a complex problem, involve a number of employees, or where the relevant facts are likely to be in dispute an employer should usually proceed with a formal investigation, so, even in cases where the problem is quickly and informally resolved, the matter should be documented with the complaining employee acknowledging that the problem has been remedied.

Additionally, an employer should evaluate a complaint to determine whether any interim action is necessary. Interim action can include temporary job reassignment, allowing a complaining employee time off, or suspending an accused harasser with any pending completion of an investigation. Although each case is dependent on its own set of facts and circumstances an employer generally should take only those interim actions necessary to protect an employee or preserve the integrity of the investigation process. Allegations of harassment involving rape, battery, physical touching or other extreme conduct will often necessitate some form of interim actions being taken. Interim measures, however, must always be reviewed to make sure that the complaining employee is not negatively impacted. For example, reassigning a complainant to a less desirable position may be considered a form of retaliation.

III. Planning the Investigation

After making a decision to conduct a formal workplace investigation, an employer should formulate a plan concerning how to proceed with the investigation. The plan should identify:

- Who will be conducting the investigation?
- What documents (e.g. personnel files) will be looked at?
- Who will be interviewed?
- The order in which people will be interviewed.
- Standard information that each person will be told as part of the interview process.

The investigators chosen to conduct the workplace investigation must be neutral, objective and free from any perceived bias. The investigators must understand their role, the issues to be investigated, and have available sufficient time to investigate the complaint thoroughly. The investigators must be capable of instilling confidence in the process while still remaining firm enough to ask difficult questions. Individuals chosen to conduct a workplace investigation should make credible and effective witnesses should it be necessary to justify the findings later. In certain case where the complainant is a woman it may be advisable to have at least one woman on the investigation team should sensitive questions of a sexual nature need to be asked. Lastly, where the alleged harasser is a high level official in the organization it is often advisable to choose individuals from outside the organization to conduct the investigation to avoid claims that the investigators were biased or felt constrained in their investigation.

The investigation planning process should also include preparing for employee interviews. In most circumstances a list of standardized questions should be prepared. Standard responses to likely questions those being interviewed will ask the investigators should also be developed. Additionally, a standard opening and closing statement to be given at each interview should be prepared.

Lastly, before the investigation actually begins an outline of the planned investigation detailing the issues to be investigated, the facts as alleged by the complaining employee, and who will be conducting the investigation should be sent to the complaining employee to verify that the planned investigation will address the concerns raised. This practice avoids potential misunderstandings that could result in investigations that fail to address an employee's primary concerns. It also gives the complaining employee an opportunity to raise any objections he or she may have as to the identity of the investigators.

IV. The Investigation

The key to an effective workplace investigation is to obtain as much information as possible. The investigation should include interviews with every person identified as potentially having information. The investigation should follow up on every lead or related allegation. This may result in people being interviewed and reinterviewed a number of times.

At the outset of each initial interview, the investigators should explain the purpose of the investigation and what is expected of the employee. Each person interviewed should be told that although the employer takes the allegations seriously no conclusions have yet been made. Each employee should be told that they have a duty to answer all questions that are asked and disclose all information they have relevant to the allegations. Employees should be told that their failure to cooperate with the investigation may result in disciplinary action up to and including termination. Each employee should also be instructed not to discuss the investigation with other employees until the investigation is complete. Lastly, the employer's policy of prohibiting retaliation and the consequences for employees that engage in retaliatory conduct should be explained.

During the interviews, the investigators should strive to engage in effective questioning. Generally, broad standard questions should be asked first, followed up with more specific questions depending on the interviewee's response. Each person interviewed should be asked to put things in chronological order or otherwise identify relevant time periods. Each person giving pertinent information should be asked whether anyone else was present or can otherwise substantiate the information. Questions which might test the veracity of the person interviewed should also be asked if possible.

At the conclusion of each interview, employees should be asked whether they have any additional information regarding inappropriate workplace behavior. Each person interviewed should be told that if they remember any other pertinent information they should contact the investigators. Additionally, each person interviewed should be asked to acknowledge or correct the investigators' understanding of the answers to the questions posed. In many cases obtaining a signed statement from each employee summarizing the interview and the employee's responses is a good practice. However, agencies need to be aware that such documents will be subject to the open records law. Lastly, each person interviewed should be reminded that they are not to talk about the investigation and that retaliation in any form will not be tolerated.

Throughout the investigation process, an employer should strive to balance the needs of ending harassing behavior with protecting the rights and reputation of both the complainant and the accused. To avoid potential defamation claims, excessive publication of the charges and information received during the investigation should be avoided. Investigators, agency officials, and other employees should refrain from discussing the charges and related information outside of the context of the

investigation. The allegations and information obtained during the investigation should be maintained as confidential as possible within the limitations of state and federal law (e.g. open records law).

V. Evaluating the Information

After obtaining all of the information available, the investigators need to evaluate the information to determine what facts are supported by the investigation. It is important that the investigators base their findings on competent information coming from individuals' personal knowledge. Findings based on hearsay, innuendo and rumor are highly suspect and may expose the employer to liability should the employer act on such information. Continuing the investigation may be required to obtain first hand information.

Additionally, the investigators may need to make some credibility assessments to make factual findings. In assessing credibility the investigators should consider the interviewee's demeanor, whether the interviewee's statements were consistent, whether the interviewee's description of events is logically consistent with the statements of others, whether the interviewee's description is plausible or farfetched, and whether the interviewee was fully cooperative with the investigation process. After resolving any conflicting statements and assessing credibility the investigators should detail their findings in an investigation report which typically would go to upper management to decide on what corrective action to take.

VI. The Investigation Report

The investigation report should outline the findings of the investigators and should describe how the investigation was conducted. Because the report may be evidence in future proceedings, the report should be written in a manner which clearly and persuasively supports the ultimate findings that were made. For example, if credibility was a determinative factor, the report should identify how and why one person or one description of events was more credible than another. Additionally, the findings should not be written in legally conclusory terms (e.g. "hostile work environment," "discriminatory," "sexual harassment"). Rather the findings should be couched in terms of the specific unacceptable conduct at issue.

Because the investigation report can be such an important document a draft version of the report should be reviewed by legal counsel before the report is finalized. Legal counsel can help identify legal issues as well as help determine whether certain facts meet certain legal standards. Legal counsel can also help identify what forms of corrective action may be legally appropriate.

VII. Taking Corrective Action

After an investigation and report is completed management must decide what corrective action, if any, should be taken. Corrective action can take the form of a simple memo to all employees reminding them that certain conduct and discussions are inappropriate and will not be tolerated in the workplace or it can go all the way to terminating one or more employees. What level of response is appropriate necessarily depends on what conduct is involved, who is involved, and whether similar conduct has occurred in the past. The corrective action taken, however, must end the harassment. It is also important to remember that an employer has an obligation to do follow up monitoring to ensure that the harassment has stopped.

In those cases where the alleged harassment cannot be substantiated, the employer should nevertheless go over the employer's policies prohibiting harassment with the complainant and the accused. The complainant should specifically be told that the employer intends to protect the employee from inappropriate workplace behavior and that the employee should report any subsequent incidents of perceived harassment or retaliation. The alleged harasser should be told in the strongest terms that any acts of harassment or retaliation will result in disciplinary action being taken, up to and including termination. Although no formal disciplinary action should be taken in those cases where the harassment could not be substantiated, the employer should consider the possibility of a transfer as a means of separating the complainant and the alleged harasser. However, again, care must be taken to ensure that the transfer does not impact the complainant negatively or operate as a disciplinary measure being imposed upon the alleged harasser. Lastly, in many cases, especially where the allegations are widely known amongst employees, the employer should reiterate to all employees its policy of prohibiting all forms of harassment and retaliation against those that report inappropriate workplace behavior.

Where inappropriate workplace behavior is substantiated, questions an employer should ask in determining what corrective action to take include:

- Was the incident an isolated incident or does it reflect a pattern of inappropriate behavior?
- Was the incident severe enough to objectively create a hostile work environment?
- Is the person that engaged in inappropriate workplace behavior a supervisory employee?
- Has any supervisory employee failed to report or act on known or suspected harassment?
- What were the prior relationships between the employees involved?

- Did the incident involve inappropriate physical touching? Verbal abuse or merely inappropriate discussions?
- Did the complaining employee in any way indicate that the behavior was welcomed?
- Have there been past instances of inappropriate workplace behavior at the job site?
- Were verbal comments made in a derogatory or hostile fashion or merely unintended offensive utterances?
- Is there anything which would indicate that women or any other protected class were singled out for differential treatment?

However, it is important to recognize that even in those situations where it is determined that the complained of acts were not unwelcome or not severe or pervasive enough to create an objectively hostile work environment, employers should still generally take some corrective action to deter inappropriate workplace behavior which if left unchecked could run the risk of giving rise to a later hostile work environment claim. Employers should take a zero tolerance approach. Inappropriate workplace touching should not be tolerated regardless if it is welcome or unwelcome. Inappropriate language, jokes, or discussions of a sexual, ethnic, racial, religious or other suspect nature should not under any circumstances be tolerated in the workplace.

VIII. The Final Investigation File

Because an employer may be called upon to show how it responded to claims of harassment, violence or discrimination long after the fact, the final investigation report, all supporting notes and memorandum generated during the investigation, and documents relevant to any corrective action taken should be maintained in a final workplace investigation file. This file should be maintained separately from any employee's personnel file.